3.21 Lack of record (CPLR 4521)

A statement signed by an officer or a deputy of an officer having legal custody of specified official records of the United States or of any state, territory or jurisdiction of the United States, or of any court thereof, or kept in any public office thereof, that he [or she] has made diligent search of the records and has found no record or entry of a specified nature, is prima facie evidence that the records contain no such record or entry, provided that the statement is accompanied by a certificate that legal custody of the specified official records belongs to such person, which certificate shall be made by a person described in [CPLR] 4540.

Note

This rule restates CPLR 4521, which sets forth a hearsay exception for the admissibility, as prima facie evidence, of a certificate of the legal custodian of government records that after a "diligent search" (*see Briggs v Waldron*, 83 NY 582, 585 [1881]) "no record or entry" of the item searched for was found.

More than a century ago, the Court of Appeals in *Deshong v City of New York* (176 NY 475, 485 [1903]) stated the rationale for the statute:

> "The law presumes that all officers intrusted with the custody of public files and records will perform their official duty by keeping the same safely in their offices, and if a paper is not found where, if in existence, it ought to be deposited or recorded, the presumption thereupon arises that no such document has ever been in existence, and until this presumption is rebutted it must stand as proof of such non-existence."

The statute is limited to government records of the "United States or of any state, territory or jurisdiction of the United States, or of any court thereof." In *Brill v Brill* (10 NY2d 308, 310 [1961]), however, the Court of Appeals, in accord with prior common law, on a motion for summary judgment, accepted certificates of officials of Mexican courts, "duly authenticated by the Vice-Consul of the U. S. A.," stating that "they have searched the files of the court since the year 1954 but that no divorce action" between the parties in the New York action "has been registered."

"CPLR 4521 and its predecessors have provided an expeditious method of proving such matters as the failure of a married couple to have obtained a divorce decree (*Matter of Brown's Estate*, 1976, 40 N.Y.2d 938, 390 N.Y.S.2d 59, 358 N.E.2d 883), the failure of a landowner to have obtained a building permit (*Deshong v. City of New York*, 1903, 176 N.Y. 475, 68 N.E. 880), and the failure of a contractor to have obtained a license to do business (*Dartmouth Plan, Inc. v. Valle*, 1983, 117 Misc.2d 534, 458 N.Y.S.2d 848 (Sup. Ct. Kings Co.)." (Vincent C. Alexander, Practice Commentaries, McKinney's Cons Laws of NY, Book 7B, CPLR 4521.)

Although unresolved by an appellate court, CPLR 4521 "should not preclude recognition of a common law hearsay exception for testimony about the absence of a public record." (*Id.*; *People v Niang*, 160 Misc 2d 500, 502 [Crim Ct, NY County 1994]; *see* CPLR 4543 ["Nothing in this article prevents the proof of a fact . . . by any method authorized . . . by the rules of evidence at common law"].)

In a criminal proceeding, with or without a certificate, if the lack of a record or entry constitutes testimonial evidence, the official may be required to testify, subject to cross-examination, for example, on what constituted a "due diligent" search. (*See Bullcoming v New Mexico*, 564 US 647 [2011]; *Crawford v Washington*, 541 US 36 [2004]; *People v Pacer*, 6 NY3d 504 [2006]; *People v Niene*, 8 Misc 3d 649, 651 [Crim Ct, NY County 2005] [the "affidavit" of a Department of Consumer Affairs "official who reported that her review of the Department's records disclosed that the defendant did not have a general vendor's license" was testimonial evidence; so the defendant was entitled to cross-examine its maker].)